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19   UNITED STATES DISTRICT COURT

20   NORTHERN DISTRICT OF CALIFORNIA

21   SAN FRANCISCO DIVISION

22 ORACLE AMERICA, INC.   Case No. CV 10-03561 WHA

23   Plaintiff,   **ORACLE'S MAY 14, 2012
                                           COPYRIGHT LIABILITY REPLY**
24   v.   **BRIEF**

25 GOOGLE INC.

26   Defendant.   Dept.: Courtroom 8, 19th Floor
                                           Judge: Honorable William H. Alsup
27

28

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Question 1: Copyrightability of Programming Languages

Copyright can protect an original combination of vocabulary and grammar in a computer programming language. Google's brief misstates both U.S. and European law.

Remarkably, Google claims "the 'structure' or 'organization' of words in relation to other words is not protectable." ECF No. 1116 at 2. If Google were correct, the detailed structure of novels and other writings could be freely copied. Google cites no authority and this is not the law. *See, e.g., Urantia Foundation v. Maaherra*, 114 F.3d 955, 959 (9th Cir. 1997) (selection, arrangement and structure of answers to questions from purportedly divine aliens copyrightable). Google also now claims the interdepencies in the Java APIs are "nothing special" citing only to the highly simplified *analogy* Dr. Reinhold used. But at trial its witnesses attested to the creativity and skill API design requires. *See* RT at 736:25-752:14 (Bloch); 2209:7-8 (Astrachan).

Google next contends, again without authority, that it could only be liable for copying the SSO "as a whole." ECF No. 1116 at 3. This position is inconsistent with the jury instruction Google proposed at the charging conference, which the Court essentially adopted. RT at 2401:19-2403:20. It is also wrong under the law. "[A] copyright defendant need not copy a plaintiff's work in its entirety to infringe that work." *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 2012 U.S. App. LEXIS 7079 at * 22 (9th Cir. Apr. 9, 2012) (citations omitted).

In addition, Google claims "nothing in the record suggests that Google copied the sequence in which the APIs are implemented within the source code." ECF No. 1116 at 2. Actually, Google's own expert so testified. *See* RT at 2214: 3-9 ("Q. And the Structure, Sequence and Organization of the API elements is virtually identical across those 37 packages, correct? / A. That's right."). Against this straightforward admission, Google offers an example of one class where the order of methods in Android source code differs from Java. ECF No. 1116 at 2-3. This proves nothing. The order in which the methods appear within each class is not what matters from a technical or structural standpoint. What matters is that the methods appear within the same classes and packages as in the 37 Java APIs and have the same relationships to other elements. The sequence of parameters in a method's parameter list also matters and Google copied thousands of those. RT at 2212:7-13 (Astrachan). Moreover, the record shows Google

1   did copy the order of methods in the source code. *See, e.g.,* ECF No. 1115 at 2 (citing source

2   code). This is another example of Google copying more than it required for "compatibility."[1]

3   Google mistakenly claims the CJEU held in *SAS* that "The programming language is not a

4   'form of expression of that program' for purposes of copyright law." ECF No. 1116 at 4. The

5   CJEU held only that programming languages are not a form of expression of a computer program

6   for purposes of protecting computer programs under the Software Directive. Case C-406/10, *SAS*

7   *Inst., Inc. v. World Programming Ltd.*, Judgment (May 2, 2012) ¶ 39. It ruled that programming

8   languages (and data formats) could be copyrightable under the Copyright Directive if they

9   constitute the "author's own intellectual creation." *SAS* ¶ 45. *SAS* also states that copying the

10   "choice, sequence and combination" of keywords, syntax and commands from a user manual

11   could constitute infringement under the Copyright Directive. *Id.* ¶¶ 66-67, 71.

12   Google also misquotes *SAS* as saying protecting programming languages would "amount

13   to making it possible to monopolise ideas, to the detriment of technological progress and

14   industrial development." ECF No. 1116 at 4-5 (quoting *SAS* ¶ 40). The sentence actually refers

15   to protecting "the functionality of a computer program" only. *See SAS* ¶ 40.

16   Lastly, *SAS* did not concern "in essence, the question in the present case." ECF No 1116

17   at 4. Less copyrightable expression was at issue. In *SAS* the defendant did not copy "any of the

18   structural design of the source code." *SAS* ¶ 25. A jury has found against Google on that point.

19   In addition, *SAS* did not concern APIs. *See* Case C-406/10, *SAS Inst., Inc. v. World Programming*

20   *Ltd.*, (Nov. 29, 2011) ¶ 79 (file formats were "blank forms" with read/write locations).

21   **Question 2: Google Copied More Than Names and Headers of Declarations**

22   Google admits it "used the same method declarations." ECF No. 1116 at 5. This means it

23   copied the names, parameters, parameter sequence, return types, and "throws" clauses (exception

24   lists) in the Java APIs. *See id.* at 5. Google did not have to copy most of these elements to design

25   its own method with similar functionality. To use the example of the password authentication

26

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[1] Methods are not just ordered "*alphabetically*" in the documentation. ECF No. 1116 at 3.

27   In both Java and Android, the shorter method summaries are in alphabetical order. But in Java
the more extensive "method detail" section follows the order in the source code. Android is

28   inconsistent. In any event, the complex API organization is not just alphabetical.

1   from Oracle's opening brief (ECF No. 1118 at 13), Google could have rearranged the order of the

2   eight parameters, changed their names, given the method a different name or chosen to throw an

3   exception, all without changing the underlying idea of obtaining a password given certain inputs.

4   By copying the method names and declarations, Google copied Oracle's design and

5   structure. The methods are a creative and essential part of the structure that represent years of

6   design effort. Unrebutted evidence showed Sun and Oracle had many possible method choices in

7   designing these 37 API packages. RT at 597:9-13, 627:21-629:5; 630:11-631:18 (Reinhold); *id.*

8   at 1238:11-1240:8; 1240:23-1244:16 (Mitchell). Many creative decisions are involved in

9   something as simple as choosing the methods for drawing a rectangle. ECF No. 1118 at 5-6. By

10   copying the SSO of thousands of these methods, Google infringed. No engineering team

11   independently could have come up with all these same solutions. RT at 1249:18-25 (Mitchell).

12   Google's argument that "the declarations are, in essence, the titles of the things they

13   declare" is incorrect. ECF No. 1116 at 5. The method declarations in the Java APIs are not titles

14   or names. They express essential parts of the SSO and are copyrightable as such. In *Applied*

15   *Innovations Inc. v. Regents of Univ. of Minn.*, for example, the court rejected the argument that

16   short, declarative sentences in the plaintiff's psychology test, such as "I am a good mixer," were

17   uncopyrightable because of their significance in the context of the test. 876 F.2d 626, 634-35 (8th

18   Cir. 1989) ("The test statements are short, simple, declarative sentences, but they are not merely

19   fragmentary words and phrases within the meaning of 37 C.F.R. § 202.1(a). They are not names

20   or titles or slogans."). In *Health Grades, Inc. v. Robert Wood Johnson Univ. Hosp., Inc.*, the

21   court found the plaintiff stated a copyright infringement claim based on copying of its ratings and

22   awards such as "five stars" and "clinical excellence" because they represented sufficiently

23   original compilations of fact. 634 F. Supp. 2d 1226, 1238 (D. Colo. 2009). The court noted that

24   there is a "paucity of cases holding that an otherwise original expression is uncopyrightable solely

25   because it is a short phrase" and concluded that the copyright regulation on this topic, 37 C.F.R.

26   202.1(a) "does not strip copyright protection from such original expression." *Id.* (citation

27   omitted). *Accord Compaq Computer Corporation v. Ergonome, Inc.*, 137 F. Supp. 2d 768, 774 -

28   775 (S.D. Tex. 2001). *See also CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*,

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1   44 F.3d 61, 67 (2d Cir. 1994) (upholding copyrightability of used car pricing guide).

2   Similarly, in *West Publ'g Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1227 (8th Cir.

3   1986), the court found that West was likely to prevail on its claim that LEXIS copied its

4   pagination. The court emphasized that in copying the pagination, the defendant was copying

5   West's arrangement of decisions: "The key to this case, then, is not whether numbers are

6   copyrightable, but whether the copyright on the books as a whole is infringed by the unauthorized

7   appropriation of these particular numbers." *Id.* In *Matthew Bender & Co. v. West Publ'g Co.*, the

8   Second Circuit reached the opposite conclusion on the same facts, but for reasons that are clearly

9   distinguishable here: the pagination was automatically generated and did not reflect "even a

10   modicum of creativity" and West's arrangement was not copied 158 F.3d 693, 699-700 (2d Cir.

11   1998). Here creativity and Google's copying of the SSO were both undisputed.

12   **Question 3: Fully Qualified Names Can Have More Than Three Parts**

13   In stating that the fully qualified name "has three parts," (ECF No. 1116 at 6), Google

14   overlooks subpackages and nested Member classes and interfaces. *See* ECF No 1118 at 7.

15   **Question 4: Google Could Have Come Up With Its Own Names and SSO**

16   Google admits that "It would have been possible in many instances for Google to have

17   created APIs with different names and/or SSO that would have provided similar functionality."

18   ECF No. 1116 at 6. Its legal and factual arguments for why it did not do so are meritless.

19   The elements of the 37 API packages that are required to implement the Java language are

20   minimal. *See* Questions 6-8 *infra*. Google's primary argument is that industry custom and

21   developer demand required it to copy these 37 API packages. But Google cannot use the demand

22   for Oracle's copyrighted product as an "external factor" constraining Google's development.

23   None of the cases it cites support its position; all but one have been addressed previously. The

24   only new case it cites for this point, *Swirsky v. Carey*, shows just how far Google has strayed: the

25   *scenes a faire* issue in that case was whether the plaintiffs' chorus was commonplace because it

26   bore resemblance to a third party melody, the folk song, "For He's a Jolly Good Fellow."

27   376 F.3d 841, 850 (9th Cir. 2004). Necessity was not at issue.

28

1   Google's factual arguments are equally flawed. It argues that without *any* APIs, the Java

2   language is unusable. But when Sun released Java in 1996 there were only 7 packages, including

3   just 4 of the 37 at issue here. Yet Java immediately became enormously popular and could be

4   used to accomplish many useful things. RT at 631:19-25; 686:6-7 (Reinhold); TX 980.

5   Even if developers demand more, Google could have designed its own APIs.

6   Dr. Astrachan's rote testimony on why developers would demand all 37 packages was shaky at

7   best. For example, he claimed developers would expect the database packages java.sql and

8   javax.sql based on little more than that he would not know how to write the code himself. *See*

9   RT at 2199:7-13 (Astrachan). Although the Court requested it, Google neglected to ask

10   Dr. Astrachan whether Google could have designed these APIs itself. *See id.* at 2197:25-2198:23.

11   When Oracle asked, Dr. Astrachan admitted it. RT at 2213:5-19 (Astrachan).

12   The Court should disregard Google's belated attempt to introduce additional evidence

13   about Spring. Mr. Ellison was Oracle's first witness. Dr. Astrachan was permitted to respond to

14   issues that arose at trial and could have responded to this one. *See* RT at 2195:10-25. But if the

15   Court does look to the Spring website, it shows Mr. Ellison's testimony was correct as to Java

16   Enterprise Edition. Spring is an enterprise application development framework, and Springsource

17   created a new environment, including dozens of new APIs with similar functionality to the Java

18   EE APIs. It had to train a whole new group of developers on those APIs. RT at 304:16-22

19   (Ellison). Oracle also proved that third parties created alternatives to a number of the Java SE

20   APIs, including the 37 at issue. *See* Oracle May 10 Brief, ECF No. 1118 at 8.

21   **Question 5: A Combination of Input-Output Schemes May Be Protectable**

22   Neither party contends the input-output scheme for an individual method alone is

23   copyrightable. The original combination of all such elements in the Java APIs, however, is

24   copyrightable. *Engineering Dynamics,* cited by Google, supports Oracle. It recognized the

25   selection of input/output formats for a computer program may be copyrightable if sufficiently

26   original. *Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 46 F.3d 408, 410 (5th Cir. 1995).

27   Moreover, like the other cases Google cites, it views the merger doctrine from the *plaintiff's*

28   perspective: "Consequently, as our opinion explains, the district court will inquire on remand

1 whether *EDI* exercised any judgment in formulating the input cards or merely reflected the

2 industry standards and laws of engineering." *Id.* (emphasis added). The Court placed a specific

3 burden on Google prove merger and *scenes a faire*. ECF No 433 at 9. Google never met it with

4 respect to the combination of input-output schemes or any other elements of the APIs.

5 **Questions 6-8: Relationship Between APIs and the Java Programming Language**

6 Google urges that all 37 packages are "core" to the Java programming language. ECF

7 No. 1116 at 11-12. No witness testified to this definition, and Google concedes that the

8 documentation for J2SE 5.0, the version relevant here, does not use the term "core" to refer to any

9 subset of API packages. ECF No. 1116 at 11 n.7.

10 The term "core" should not be used as a basis for the Court's decision. Rather than

11 speculate based on marketing descriptions on a book cover or loose terminology, the Court should

12 look to the *Java Language Specification* (*3rd ed.*) ("JLS"), which both parties' witnesses agreed

13 defines exactly what the language requires. TX 984; RT at 641:4-642:25 (Reinhold); RT at

14 776:3-778:9, 780:24-781:1 (Bloch). The parties also agree that the language directly references

15 only 60 or 61 classes. TX 1062; RT at 676:1-681:2 (Reinhold); RT at 777:21-24 (Bloch).

16 The JLS shows that for most classes the language merely requires the existence of a class

17 with a particular name. TX 1062; RT at 676:14-678:13 (Reinhold) ("There is no mention of what

18 methods might be in them, what fields they might have. They could have anything, as far as the

19 language specification is concerned."); *id.* at 681:22-682:2. Google could therefore have

20 designed entirely different classes as long as they had these names. For other classes, the JLS

21 requires the presence of only one or a handful of methods or fields. Again, Google could have

22 designed entirely different classes as long as they had these methods and fields. Exhibit A is a

23 complete list of the page numbers in TX 984 where the Court can find these methods and fields.

24 Google vastly overstates the number of references that these 61 classes make to elements

25 in other packages, or that are made by the 3 packages java.lang, java.io and java.util. *See* ECF

26 No. 1118 at 11. But this is irrelevant in any event. The JLS does not require any of them. The

27 JLS does not require that any identified class, method, or field to have any relationship

28 whatsoever with any API element in any other package. .

1   Finally, Google misconstrues TX 1063, which is simply a list of the 39 classes and

2   interfaces that the compiler mentions, not what the JLS requires. RT at 679:22-681:21. No

3   witness claimed at trial that TX 1063 should be used as the list of classes the language requires.

4   **Question 9: Interdependencies in the Implementation**

5   The parties' experts agreed that the SSO of Google's implementation of these 37 API

6   packages is virtually identical to Oracle's. ECF No. 1118 at 12. When Google says the

7   implementations are different, it is using the word "implementation" to refer to the method bodies

8   alone, ignoring that structural identity. The parties agree that there was no testimony at the trial

9   on the extent to which interdependencies in the method bodies of Java and Android are similar.

10   **Question 10: Interdependencies in Names and Declarations**

11   Google's brief contains an incomplete list of the interdependencies that exist at the name

12   and declaration level. The Court should look to Oracle's brief. *See* ECF No. 1118 at 12-13.

13   **Question 11: Google Misconstrues the Holding In the *ADA* Case**

14   After repeatedly touting Judge Easterbrook's copyright expertise (*see*, *e.g.*, ECF No. 778

15   at 3), Google now asks the Court to disregard his opinion in *ADA* because it is "nonsensical" and

16   "poorly reasoned." ECF No. 1116 at 13, 15. Google claims the case "has only been cited three

17   times by *any* court." ECF No. 1116 at 13 (emphasis in original). This is false. Shepardizing

18   *ADA* shows more than 25 decisions around the country have cited it.

19   Google also argues *ADA* does not actually hold a taxonomy can be copyrighted and claims

20   the Seventh Circuit has cited the decision "only once, and only for propositions unrelated to the

21   'taxonomy' holding." ECF No. 1116 at 13. Google is wrong again. In *Edgenet, Inc. v. Home

22   Depot U.S.A., Inc.*, 658 F.3d 662, 666 (7th Cir. 2011), Judge Easterbrook described his opinion in

23   *ADA* as "holding that taxonomies are copyrightable." The *ATC* case Google cites questioned only

24   whether a numbering system alone could be copyrightable, and agreed with *ADA* that

25   "Classification schemes can in principle be creative enough to satisfy the originality requirement

26   of copyright protection." *ATC Distrib. Grp., Inc. v. Whatever It Takes Trans. & Parts, Inc.*,

27   402 F.3d 700, 706 (6th Cir. 2005) (citing *ADA*). *See also Kendall Holdings, Ltd. v. Eden

28   Cryogenics LLC*, 2012 U.S. Dist. LEXIS 5245, at *18-19 (S.D. Ohio Jan. 17, 2012) (quoting

1   same *ADA* language with approval).

2   Google next argues "nothing in the decision supports the conclusion" that the ADA's

3   numbering system was copyrightable. ECF No. 1116 at 13-14. This is wrong too. *ADA* states

4   "even the short description *and* the number are original works of authorship." 126 F.3d at 979

5   (emphasis added). It explains why the numbering is copyrightable and then *again* states that "all

6   three elements of the Code – numbers, short descriptions, and long descriptions, are copyrightable

7   subject matter." *Id.* Other cases recognize *ADA* held the numbering system alone was

8   copyrightable. *See, e.g., Southco, Inc. v. Kanebridge Corp.*, 258 F.3d 148, 155 (3d Cir. 2001).

9   Google argues that the taxonomy in *ADA* "is an unprotectable system." ECF No. 1116

10 at 14. But the copyrightability of taxonomies is well accepted. Google still has never explained

11 what it means by "system." As *ADA* states, "A dictionary cannot be called a 'system' just

12 because new novels are written using words, all of which appear in the dictionary. Nor is word-

13 processing software a 'system' just because it has a command structure for producing

14 paragraphs." *ADA*, 126 F.3d at 980. Google tries to distinguish the APIs claiming that, unlike

15 the numbering system in ADA, the APIs come with "instructions for use" like "a recipe for a new

16 dish" and are the means by which developers express themselves. ECF No. 1116 at 14 (quoting

17 *ADA* 126 F.3d at 980). It is not clear what difference this would make or what the reasoning was

18 for the Seventh Circuit's reference to "instructions for use." Like the Code taxonomy at issue in

19 *ADA*, APIs describe the various elements in the libraries and the relationships among them.

20 While the APIs can be used as a blueprint to implement the class libraries, Google's witnesses

21 repeatedly stated at trial that the APIs are not the equivalent of a recipe for developers to write

22 Java programs. *See, e.g.,* RT at 769:4-12 (Bloch). And even if they were a "system," the detailed

23 expression of that system, which Google copied, is still protectable.

24   The ADA code was copyrightable even though the ADA encourages the code's use by

25 insurers, dentists and others. *ADA*, 126 F.3d at 981. Like the ADA, Oracle does not contend

26 developers cannot invoke the Java APIs in their applications. Its complaint is Google creating an

27 unlicensed, incompatible copy of the Java APIs. This was the same reason the ADA sued,

28 because the defendant "used most of the code but made modifications." *See id.* The court found

1   it could not "make and distribute a derivative work based on the Code." *Id.* Instead of furthering

2   compatibility, Google chose to "embrace, extend and extinguish," copying enough of the Java

3   APIs to capture Java developers and move them over to its own incompatible platform.

4   **Question 12: Google Misconstrues *CDN v. Kapes***

5   The parties agree *Kapes* treated the plaintiff's price estimates as a compilation. ECF

6   No. 1116 at 15. But Google is wrong in stating the court determined "that the coin prices in its

7   guide were not of its own creation." *See id.* (citing *CDN Inc. v. Kapes*, 197 F.3d 1256, 1260 (9th

8   Cir. 1999)). The Ninth Circuit agreed with the district court "that the prices in CDN's guides are

9   not facts, they are 'wholly the product of [CDN's] creativity.'" *CDN*, 197 F.3d at 1260.

10   The API packages are also entitled to protection under the *Kapes* definition of

11   compilation. Oracle's quarrel with the statutory definition is that it states a compilation is based

12   on "the collection and assembling of preexisting materials or of data." 17 U.S.C. § 101. *See* ECF

13   No. 853 at 1. The APIs are also original works of authorship. Oracle is not claiming registration

14   as a collective work, but has consistently claimed protection for the combination of elements

15   contained in the 37 API packages. *See, e.g.,* ECF No. 339 at 15-16 (SJ Opp.), ECF No. 853 at 1

16   (Apr. 3, 2012 brief), ECF No. 997 at 4-5 (comments on jury instructions). This principle is

17   recognized in cases such as *Satava v. Lowry*, 323 F.3d 805, 810-11 (9th Cir. 2003) (considering

18   combination of unprotectable elements in sculpture that was original work of authorship) and

19   *Merch. Transactions*, 2009 U.S. Dist. LEXIS 25663 at *46. The 37 API packages are protectable

20   under the principles expressed in those cases, regardless of how they were registered or labeled.

21   **Question 13: Google's Definition of Compatibility Is Incorrect**

22   Google states, without citing any authority, that what matters in this case is whether

23   Android "is compatible with the APIs in the 37 packages in the computer science sense," by

24   which its means that code "written using the APIs in [the 37] packages will work on both

25   platforms." ECF No. 1116 at 16. This is not the proper definition. *See, e.g., Creative Labs*

26   *Inc. v. Cyrix Corp.*, 42 USPQ2d 1872, 1875 (N.D. Cal. 1997) (emphasizing "importance of

27   precise definitions in the computer industry" in rejecting partial compatibility definition similar to

28   Google's, and holding that compatible product "must support the same functions").

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1   Google claims its narrower definition "is not a position adopted just for this litigation."

2 ECF No. 1116 at 17. That is false. Google acknowledged when it released the Android SDK in

3 November 2007 that Android is not compatible with Java. *See* TX 383 at 8 (Android Press Q&A)

4 ("048. Does Android support existing Java apps? / A. No. / 049. Is Android Java compatible? / A.

5 No."). In contrast, Oracle's definition of compatible has been used in the specification license

6 since Java's release. *See* TX 980 at 6 (1996 API book); TX 610.1 (specification license).

7   The accepted definition of compatibility—and the relevant definition for this case—is that

8 programs written for Java will run on Android and vice versa. Android is incompatible. *See* ECF

9 No. 1118 at 18-19. But even under Google's narrow definition, Android is not compatible.

10 Android does not have all of the classes and methods defined in these 37 packages in J2SE 5.0.

11 ECF No. 1124. The classes Google did include are nearly identical. For example, the package

12 java.security.auth.login in Android consists in its entirety of one exception, LoginException,

13 which has two constructors, LoginException() and LoginException(String message). This

14 exception, with the same two constructors, is present in the java.security.auth.login package in

15 Java as well. TX 610.2, TX 767. But any code that uses a class or method defined in one of the

16 37 packages in J2SE 5.0 but not in Android will not work on Android.

17 **Questions 14-15: Inheritance Among Packages and Classes**

18   The parties essentially agree on the rules of inheritance for packages and classes.

19 **Question 16: SSO and the Java Language**

20   The Court asked the parties to identify what Google copied other than names and input-

21 output designations. Google's list is incomplete, so Oracle refers the Court to its list. *See* ECF

22 No. 1118 at 19-20. Google's list does include exceptions (*see* ECF No. 1116 at 18), which Oracle

23 mentioned elsewhere in its brief. That should be added to Oracle's response as well.

24   The Court also asked the parties, "to what extent was Android's SSO dictated by the rules

25 of the basic programming language." ECF No. 1088. Google ducked the question. *See* ECF

26 No. 1116 at 18. That is because the language does not dictate the SSO of either Android or Java.

27 Google's expert conceded this. *See* RT at 2223:3-20 ("Classes have to be classes and packages

28 have to be packages, but what the functionality is, is what the API designers decide.").

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1   Dated: May 14, 2012   MORRISON & FOERSTER LLP

2

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